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In The
Supreme Court of the United States
October Term, 1984

LOUIE L. WAINWRIGHT, Secretary,
Florida Department of Corrections, et al.

Petitioner,

vs.

HOWARD VIRGIL LEE DOUGLAS,

Respondent/Cross-Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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TABLE OF CONTENTS

Pages

Table Of Authorities i

Reasons For Not Granting The Petition For Certiorari 1

Conclusion 6

TABLE OF AUTHORITIES

CASES:

Blair v. State, 406 So.2d 1103 (Fla. 1981) 4

Boykins v. Wainwright, 737 F.2d 1539 (11th Cir. 1984) 5

Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983) 2, 3, 4

Douglas v. Wainwright, 739 F.2d 531 (11th Cir. 1984) 1, 2, 5

Halliwell v. State, 323 So.2d 557 (Fla. 1975) 4

Hutto v. Davis, 454 U.S. 370, (1982) 5

Kampff v. State, 371 So.2d 1007, 1010 (Fla. 1979) 4

Rummel v. Estelle, 445 U.S. 263 (1980) 5

Strickland v. Washington, 466 U.S. —, 104 S.Ct. 2052 (1984) 1, 2, 3, 4, 5

Tedder v. State, 322 So.2d 908 (Fla. 1975) 4, 5

Washington v. Wainwright, 737 F.2d 922 (11th Cir. 1984) 5

CONSTITUTIONAL PROVISIONS:

Sixth Amendment, United States Constitution 1

TABLE OF AUTHORITIES—Continued

Pages

OTHER AUTHORITIES:

Rule 17 1(a), *Rules of the Supreme Court of the United States* 1

American Bar Association Standards For Criminal Justice, The Prosecutor Function and The Defense Function (2 ed 1980) 2, 3

I.

REASONS FOR NOT GRANTING THE PETITION FOR CERTIORARI

In *Strickland v. Washington,* 466 U.S. —, (1984), this Court set forth standards for evaluating a claim of ineffectiveness of counsel in the context of the Sixth Amendment during the course of a trial. Douglas' claim, as in *Washington,* surrounds the performance of counsel during the capital sentencing phase under Florida law, and as this Court emphasized, is indistinguishable from an ordinary trial. Hence, effective assistance of counsel under Florida's capital sentencing hearing has as its focal point that counsel ensure that the adversarial testing process works to produce a just result vis-a-vis, whether a sentence of life or death is to be imposed.

The court of appeals correctly determined that the two prong test announced in *Washington* was satisfied in *Douglas. Douglas v. Wainwright,* 739 F.2d 531 (11th Cir. 1984). Moreover, the court of appeals found that Douglas' claim of ineffectiveness of counsel satisfied a standard even more strict than *Washington's* "reasonable probability" standard. *Id.* at 533.

Petitioner is dissatisfied with this result and merely seeks to review a decision of the Court of Appeals with which it does not agree. Petitioner's main thrust is to chastise the lower court for the length of its opinion and for failing to reiterate the blatent inadequacies of counsel and resulting prejudice previously discussed seriatim in the lower court's prior opinion. These complaints are not a basis for certiorari review.

Rule 17 1(a), *Rules of the Supreme Court of the United States,* suggests that this Court will grant certi-

orari, absent a conflict, "when a federal court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of [the] court's power of supervision." The decision of the Eleventh Circuit herein does not fall within this language and its ruling with respect to Respondent's ineffective assistance of counsel claim is clearly correct and comports with *Washington.*

As the lower court stated "counsel here conceded before the trial court that he had done nothing to prepare for the penalty phase of the trial." *Douglas v. Wainwright,* 714 F.2d 1532 (11th Cir. 1983) at 1556. Unlike *Washington* where investigation and tactical decisions were made by counsel at sentencing, counsel for Douglas had neither familiarized himself with the statutory law as to the sentencing phase nor even discussed with Douglas prior to trial any evidentiary considerations for the sentencing phase. As pointed out by the Court of Appeals "counsel had discussed the need for such a suggestion, if at all, only 'briefly' between the guilt and sentencing phases."[1] *Id.* at 1556. Furthermore, "[a]s evidenced by the conference in the judge's chambers, counsel did not understand the purpose of the penalty phase, so he would have been unable to advise [Douglas] as to the need for and the significance of witnesses at the penalty phase." *Id.* at 1556,

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[1] It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or *penalty*. [emphasis supplied] ABA Standards for Criminal Justice 4.1 (2d ed 1980).

1557.[2] As this Court pointed out in *Washington* ". . . counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Counsel for Douglas not only failed to familiarize himself with Florida's statutory sentencing phase in a capital case but he did not investigate or pursue any potential mitigating evidence, nor did he consult with his client prior to the penalty phase. *Washington* likewise stated, it is clear "[f]rom counsel's function as assistant to the defendant derives the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Petitioners' assertion that counsel was effective seems centered on the fact that counsel was experienced and was assisted by a former assistant United States Attorney. The focus of the performance prong of *Washington* is on what counsel did, not on who he is. An inquiry into counsel's conversations with his client may be critical to a proper assessment of counsel's investigation. Here there were none. Having failed to prepare or investigate for the penalty phase as to any mitigating circumstances counsel for Douglas then proceeded to exacerbate his failings by repeatedly emphasizing to the court—the ultimate sentencer—that there existed no mitigating evidence. *Douglas v. Wainwright, supra,* at 1557. As if not satisfied, he then volun-

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[2] The lawyer for the accused should be familiar with the sentencing alternative available to the court and should endeavor to learn its practices in exercising sentencing discretion. The consequences of the various dispositions available should be explained fully by the lawyer to his client. ABA Standards for Criminal Justice 8.1 (2d ed 1980).

teered that Douglas had "not been a good boy" and "highlighted before the judge that all he could argue to the jury was that Douglas was a human life because there was no other evidence." *Id.* 1557. As this Court recognized in *Washington* one of the basic duties of counsel is the duty of loyalty to his client. In summary, having done nothing in preparation for the penalty phase counsel then went further by his conduct and words to prejudice the court. This conduct breaks down the adversarial process and renders the result of the proceeding unreliable.

In this context, it must be emphasized that the jury *unanimously* recommended life imprisonment. *Douglas, supra,* at 1535. As such, given Florida law, in order to override the jury recommendation, the trial court would have to find that "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." *Tedder v. State,* 322 So. 2d 908 (Fla. 1975) at 910. Unlike *Washington* where there were multiple aggravating circumstances, only one was found here. The court of appeals pointed out that the record reveals some mitigating evidence may have existed in *Douglas, supra* n. 40 at 1557.[3] Likewise, the transcript of trial reveals that a relationship existed between Douglas and the wife of the victim.[4] It is in the

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[3] Unlike, *Washington,* no evidentiary hearing was held in the state court or federal district court on Douglas' claim of ineffective assistance even though requested. *Douglas v. Wainwright,* 714 F.2d 1532 (11th Cir. 1983) at 1554.

[4] "Emotional strain" over a love triangle or a bitter divorce generally qualifies as a mitigating factor in Florida. *See, Halliwell v. State,* 323 So.2d 557 (Fla. 1975); *Kampff v. State,* 371 So.2d 1007, 1010 (Fla. 1979); *Blair v. State,* 406 So.2d 1103 (Fla. 1981).

context of *Tedder, supra,* that counsels' ineffectiveness satisfied the prejudice prong. Even absent counsels' statements regarding Douglas, if counsel understood the statutory scheme and had prepared and investigated for the penalty phase, there is a reasonable probability that the court would not have concluded that no reasonable jury could have rendered the jury recommendation of life.

Petitioners' suggestion that *Hutto v. Davis,* 454 U.S. 370 (1982) requires summary reversal is inapposite to the Court of Appeals reinstatement of the original panel opinion. *Washington* is not to *Douglas* what *Rummel v. Estelle,* 445 U.S. 263 (1980) is to *Hutto* given the mixed questions of fact and law addressed in ineffectiveness claims. *Hutto* is not a death case and summary reversal herein would be inappropriate given the particular factual considerations which are important in resolving the *Washington* issue. Likewise, the State of Florida's reference to *Boykins v. Wainwright,* 737 F.2d 1539 (11th Cir. 1984), and *Washington v. Wainwright,* 737 F.2d 922 (11th Cir. 1984) for the purpose of trying to show an intra-circuit conflict mandating certiorari is clearly distinguishable. *Boykins* was not a death case and the question of prejudice in the context of *Tedder, supra,* did not have to be addressed. *Washington v. Wainwright,* did not address the issue of ineffectiveness of counsel. Further, prejudice in *Douglas* flows not only from counsels' statements to the court but also his failure to prepare.

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CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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